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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-

ROBBINS MEN'S & BOYS' WEAR CORP.,

Appellant,

v.

THE CITY OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
STATEMENT	1
OPINIONS BELOW	2
JURISDICTION	2
FEDERAL QUESTIONS RAISED BELOW	3
QUESTIONS PRESENTED	4
STATUTES AND REGULATIONS INVOLVED	6
FACTS	10
THE QUESTIONS ARE SUBSTANTIAL:	
1. Scope and Economics	13
2. The City's "Proprietary" Capacity and Unilateral Rent Determination	18
3. No Trespass, No Penalty—Robbins' Right of Possession	22
4. Equal Protection—Owners and Tenants	24
5. Substantive Due Process—Fair and Reasonable Occupational Rent	27
6. Procedural Due Process	31
7. What is NOT Involved	33
8. Conclusion	34
APPENDIX A	1a
APPENDIX B	11a

PAGE

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Allen Street, etc., In re, 256 N.Y. 236 (1931) 13

Atlantic Coast Line R.Co. v. City of Goldsboro, 232 U.S. 548 (1914) 3

Brand v. Chicago Housing Authority, 120 F.2d 786 (7th Cir., 1941) 21

Brown v. U.S., 263 U.S. 78 (1923) 29

Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) 28

Chester Litho v. Palisades Interstate Park Comn., 27 N.Y.2d 323 (1971) 27

City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241 (1971) 29

City of New York, Matter of (Jamaica Center I), Supreme Court, Queens Co., Index No. 3959/1972 (Castaldi, J.) 10

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PAGE

Falso Heating & Sheet Metal Co. v. State, 59 Misc.2d 12, 297 N.Y.S.2d 693 (Ct. Cl., 1967) 14

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Geist v. State, 3 Misc.2d 714, 156 N.Y.S.2d 183 (Ct. Cl., 1956) 13

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Lakeland Water District v. Onondaga County Water Authority, Matter of, 24 N.Y.2d 400 (1969) 32

LaPorte v. State, 6 N.Y.2d 1 (1959), app.dismd. 361 U.S. 116 (1959) 26, 27

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Morey v. Doud, 354 U.S. 457 (1957) 24

PAGE

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PAGE

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PAGE

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Sec. B15-37.0(a) 13
Sec. B15-37.0(b) 3, 4, 6, 8, 11, 14, 16, 18, 22-25, 27, 28, 31-34
Sec. B15-37.0(c) 4, 25

Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970:

Sec. 4621 9
Sec. 4651(5) 9, 22

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PAGE

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Secs. 14.2471(2)(B), 14.4 22

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JURISDICTIONAL STATEMENT

Appellant Robbins Men's & Boys' Wear Corp. appeals from the order of the Court of Appeals of the State of New York, entered March 24, 1975, dismissing the appeal from the order of the Appellate Division of the Supreme Court, Second Department, entered December 23, 1974, and from the order of the Court of Appeals, entered May 8, 1975, denying reargument. Said order of the Appellate Division had affirmed a decision of the Appellate Term of the Supreme Court for the 2nd and 11th Judicial Districts, entered June 27, 1973. The Appellate Term decision had reversed an order and judgment of the Civil Court of the City of New York, County of Queens, entered December 11, 1972.

Opinions Below

The New York Court of Appeals dismissed the appeal below on March 24, 1975, "upon the ground that no substantial constitutional question is involved", and delivered no other opinion. Reargument was denied on May 8, 1975, without opinion. (Those decisions are not yet reported.) The Appellate Division had affirmed on December 23, 1974, without opinion, reported at 46 A.D.2d 1016, 364 N.Y.S.2d 809. (Those orders appear in Appendix A.)

The opinion of the Appellate Term, *per curiam,* is reported at 75 Misc.2d 104, 347 N.Y.S.2d 249. The opinion of the Civil Court, by Rodell, J., is reported at 72 Misc. 2d 707, 339 N.Y.S.2d 321. (Those opinions appear in Appendix A.)

Jurisdiction

This case originated as a landlord-tenant summary proceeding to evict for non-payment of rent, and for money judgment for rent. By petition dated July 24, 1972, and by notice dated August 2, 1972, The City of New York, as landlord-petitioner, sued Robbins Men's & Boys' Wear Corp., as tenant-respondent, in the Civil Court of the City of New York, County of Queens.

Robbins' notice of appeal to this Court from the final order of the New York Court of Appeals, entered March 24, 1975, was served on June 3, 1975, and was filed on June 9, 1975, in the Civil Court, Queens County, the court possessed of the record.

Jurisdiction by appeal is conferred on this Court by 28 U.S.C. § 1257(2), authorizing appeal to this Court to review a decision of the highest court of a state—here, the Court of Appeals of the State of New York—in favor of

the validity of a state statute drawn in question on the ground of its being repugnant to the Constitution—here, the Due Process and Equal Protection provisions of the Fourteenth Amendment.

As decided below, and as stated by the Appellate Term in its opinion below (Appendix B), § B15-37.0 of the Administrative Code of the City of New York—

> "* * * is within the scope of the powers conferred by the state legislature upon the city * * *. [A] municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution; and * * * a statute of the State within the meaning of the Judicial Code, [§ 1257], which confers jurisdiction upon this court. * * *"[1]

Federal Questions Raised Below

The validity of § B15-37.0(b) of the Administrative Code of the City of New York, was drawn in question, and its repugnancy to the 14th Amendment was alleged, in the court of origin of this proceeding, the Civil Court of the City of New York, Queens County, in oral and written argument to that court. As stated in the opinion (in Appendix B):

> "The tenant has also raised the issue of the constitutionality of the [Administrative] Code Section [B15-37.0(b)] as amended. However, in conformity with the policy of our courts, the constitutional questions should not be considered unless necessary, [cases cited]. The Court will not pass upon

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[1] Reinman v. City of Little Rock, 237 U.S. 171, at 176 (1915). Accord: Atlantic Coast Line R.Co. v. City of Goldsboro, 232 U.S. 548, 555 (1914). See Zucht v. King, 260 U.S. 174 (1922).

this issue, since a disposition may be made on non-constitutional grounds. * * *"

On Robbins' cross-appeal to the Appellate Term, the questions were raised in the briefs. On Robbins' appeal to the Appellate Division, the questions were raised in Robbins' motions for leave to appeal and in Robbins' briefs. On Robbins' appeal to the Court of Appeals, the questions were raised in the notices of appeal, the jurisdictional statement, the affirmations in opposition to the City's motion to dismiss the appeal, and in Robbins' motion for reargument. In dismissing "upon the ground that no *substantial* constitutional question is involved", the Court of Appeals implicitly acknowledged that the questions had been raised.

Questions Presented

While permissibly remaining on a federally-unassisted slum-clearance condemnation site, a retailer has been charged occupational rent of $51,863 per year—the same rent and tax "override" he had paid his private landlord before condemnation terminated leases and real estate taxes—pursuant to a local law, § B15-37.0(b):

> "b. All persons in possession * * * shall * * * become tenants at will of the city and shall * * * pay the same rent * * * unless within ten days * * * they shall elect to vacate * * *."

The trial court found $21,000 per year to be fair rental value of the temporarily occupied blighted premises between vesting and relocation. Under a statutory classification made solely for administrative efficiency, the occupant here would have paid no more than fair rental value of $21,000 per year if he had owned (not leased) the premises before condemnation—pursuant to § B15-37.0(c):

> "c. Where * * * persons in possession * * * are the owners thereof, [they] shall pay the reasonable value for the use and occupancy of the premises."

—or maybe less under state case-law limiting occupational rent to the 6% interest-value of the fee-award. While ousting all courts of jurisdiction to determine or review the former tenant's occupational rent frozen by statute, the City adjusts occupational rent by administrative discretion *only* for "hardship" related to net operating losses, regardless of market-rental-value of the premises. The appellate courts below have upheld the City's absolute power to manage its realty and to set terms of occupancy of a condemnation site, unlimited by Due Process or Equal Protection.

1. Do 14th Amendment Due Process and Equal Protection limit the City's otherwise absolute power of real-estate management under New York law when the City acts as landlord in its "proprietary" capacity, specifically as to fixing occupational rent between vesting and relocation on a federally-unassisted condemnation site?

2. On a federally-unassisted condemnation site permissibly occupied between vesting and relocation: Does substantive *Due Process* mandate a factually fair and reasonable occupational rent for all commercial occupants, limited to a *maximum* of fair market-rental-value of the premises (the same valuation as in determining "just compensation"), *irrespective* of discretionary administrative rent adjustment for "hardship" available to a commercial occupant only after incurring a net operating loss on the premises?

3. On a federally-unassisted condemnation site permissibly occupied between vesting and relocation: Does *Equal Protection* invalidate a statutory owner-tenant classification which freezes a former tenant's statutory occupational rent at a sum grossly exceeding the factually fair market-rental-value charged to a former owner for the same occupancy?

Statutes and Regulations Involved

The statute which Appellant alleges to be repugnant to the Due Process and Equal Protection provisions of the 14th Amendment, is § B15-37.0 of the Administrative Code of the City of New York, enacted in 1938[2] and amended in 1948[3] and again in 1962.[4] There is no statutory statement of purpose or need, nor any published legislative history. The 1962 version of § B15-37.0(b) provides:

> b. All persons in possession of such premises at the time of the vesting of title thereto in the city, shall at the option of the city become tenants at will of such city and shall, unless the parties otherwise agree in writing, pay the *same rent in effect immediately prior to vesting of title* or unless within ten days after the vesting of title they shall elect to vacate and give up their respective holdings. (Emphasis supplied)

The statutory classification which is repugnant to the Equal Protection provision, distinguishes between former *tenants* (under subdivision b, above) and former *owners* of the real estate, under subdivision c, as follows:

> c. Where a person or persons in possession of the premises at the time of vesting of title thereto are the *owners* thereof, such person or persons shall at the option of the city become tenants at will of such city, unless within ten days after the vesting of title they shall elect to vacate and give up their holdings. Where such person or persons fail to vacate and give up their holdings, and become tenants at will of the city as herein provided, such person or persons shall pay the *reasonable value for the use and occupancy of the premises.* (Emphasis supplied)

(The full text of § B15-37.0 appears in Appendix B.)

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[2] L. 1937, ch. 929, eff. Jan. 1, 1938, Chapter 15, Title B (Consolidated Condemnation Procedure).

[3] Local Law No. 63, 1948.

[4] Local Law No. 57, 1962.

The provisions of the Federal Urban Renewal Handbook which the City "generally follows" but is not "bound" by, and which were inserted in the record by the City, are the following:

> "ESTABLISHMENT OF RENT RATES
>
> "* * * the LPA shall establish a fair rent rate for each property to be acquired. The fair rent rate shall be based on the acquisition appraisals and the experience of the LPA and shall take into consideration the condition of the property, the condition of the project area, and the terms and conditions of the occupancy. Subject to adjustments described below, these shall be the maximum rentals charged to occupants of acquired property and to any subsequent temporary lessees.
>
> "ADJUSTMENT OF RENT RATES
>
> "When the property is acquired, the LPA shall determine whether an adjustment shall be made from the fair rent rate established above. Further adjustments in the rent rates shall be made at any time that an adjustment is deemed to be appropriate and necessary, but may not be made retroactively. * * * Rental adjustments may be made under the following circumstances.

"Hardship

"Rent rates may be adjusted in cases of demonstrated hardship to project occupants. Income and ability to pay shall be a factor in determining whether a hardship exists. * * * In the case of a business concern * * *, the LPA shall adjust the rent rate to reflect adverse conditions caused by project activities."

Note: As to former tenants, "*establishment* of rent rates" is determined by § B15-37.0(b), not the Handbook; and the City "generally follows" the Handbook only as to "*adjustment* of rent rates".

The New York statutes relied on by the state courts below, and by the City, to validate § B15-37.0(b), are the Municipal Home Rule Law:[5]

"* * * every local government, * * *, shall have power to adopt and amend local laws * * *, relating to the following subjects, * * *:

"(6) The acquisition, care, management and use of its highways, roads, streets, avenues and property."

—and the General City Law:[6]

"* * * every city is empowered: * * *

"2. To take, purchase, hold and lease real and personal property * * *."

[5] N.Y. Municipal Home Rule Law (35-C McKinney's) § 10, subd. 1a(6), L.1963, c. 843, last amended L.1974, c.177, § 7.

[6] N.Y. General City Law (20 McKinney's) § 20, subd. 2, L. 1913, c.247, last amended L.1974, c. 598, §1.

(The full text of the material portions of those statutes appears in Appendix B.)

The Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970[7] provides, in material part:

"The purpose of this subchapter is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."[8]

"The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required * * * to move his business * * *, without at least ninety days' written notice * * *."[9]

The Federal Act has been endorsed by the State of New York,[10] and, though not enacted by the City of New York, is followed by the City.

[7] P.L. 91-646, 84 Stat. 1894 (1970), 42 U.S.C. Ch. 61, §§ 4601 et seq.

[8] Id., § 4621.

[9] Id. § 4651(5).

[10] N.Y. General Municipal Law (23 McKinney's) § 74-b(2), added L.1973, c.40, § 1.

Facts

On April 18, 1972, by order of the Supreme Court, Queens County, title to Block 10100 in Jamaica, Queens, vested in the City of New York, by eminent domain.[11] Block 10100 includes the one-story building occupied in part (about 85%) by Robbins Men's & Boys' Wear Corp., a retailer which operates 13 stores in New York and New Jersey (two of which stores are situated on land condemned by the City).

The City instituted this landlord-tenant non-payment summary proceeding on August 2, 1972, alleging (jurisdictionally) in its petition—

> "Respondent is the tenant of said premises who is in possession thereof under an implied rental agreement pursuant to § B15-37.0 of the Administrative Code * * *, wherein respondent is required to pay landlord as rent $4,000.00 each month in advance * * *"

—and demanding judgment for rent at $4,000 per month for the 3½ months from April 18 (title-vesting) through July 31, 1972.[12]

Prior to condemnation, the owner had leased the realty for 25 years to a prime tenant (not a party herein) at a rent of $16,000 per year, "net-net", with all taxes and other expenses payable by the prime tenant. For the

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[11] Matter of City of New York [Jamaica Center I], Supreme Court, Queens Co., Index No. 3959/1972 (Castaldi,J.).

[12] The City of New York, Landlord-Petitioner, v. Robbins Cloth-ing Store [sic], Tenant-Respondent, Civil Court, Queens County, # L&T-1867/1972. (The title was later corrected.)

1971-72 tax year, the land and buildings were assessed at $325,000, and the prime tenant paid the City $19,500 in real estate taxes. Robbins was one of two subtenants, and had been in occupancy since 1953. On April 18, 1972, Robbins was paying the prime tenant a basic rent at the rate of $48,000 per year, plus a tax "override" amounting to $3,863.34 for the 1971-72 tax year, or a total of $51,863.34. Both the prime lease and Robbins' sublease would have expired on July 31, 1972, except for termination by condemnation on April 18, 1972.

After trial, the Civil Court ruled that Robbins should pay the reasonable value of use and occupancy, not the statutory rent under § B15-37.0(b). The Civil Court found the fair rental value of Robbins' store after condemnation to be $1,750 per month, or $21,000 per year. Judgment was entered for the City for 3½ months' rent at the reasonable value of $1,750 per month. Both parties appealed. The Appellate Term reversed, and a new judgment was entered for 3½ months' rent at the statutory rent of $4,000 per month. In March 1975, the City increased its demand for the statutory rent, retroactive to the date of condemnation, to add the amount of the 1971-72 tax "override" of $3,863.34, though the realty is no longer on the tax rolls. Thus, the City's demand for statutory rent is now over $51,863.34 per year. The amount in controversy is over $31,000 per year throughout the post-condemnation occupancy.

The City did not demand possession from Robbins until August 20, 1973—sixteen months after condemnation. In January 1974, the City applied to the Supreme Court, Queens County, for a writ of assistance to obtain possession of Robbins' premises. The City's application has been repeatedly adjourned, last on June 9, 1975, until September 22, 1975. The only building still standing on Block 10100 is Robbins'; the only occupant is Robbins.

In 1970, incident to "Jamaica Development", the City's Board of Estimate had made a legislative finding that Block 10100 and certain contiguous areas were "blighted" and "substandard and insanitary"; and the Board had then authorized this condemnation and others to effect slum clearance and urban renewal. Block 10100 was intended for a private office building. Under a 99-year lease with a private developer, the City was to condemn the site, evict the tenants, demolish the buildings, and turn over a cleared site to the developer; thereafter, the developer would pay rent and would build according to a time-table. The City's delivery of the site to the developer has been postponed twice, now until April 2, 1976. In today's economic climate, there is no prospect of a new private office building in Jamaica.

The condemnation project on Block 10100 is "unassisted". No Federal moneys or agencies are involved.

As to administrative proceedings: At the trial, the Corporation Counsel stipulated:

> "* * * For the rent that we are suing for there is no administrative remedy." (A-79-80)

The Corporation Counsel further stipulated, by letter:

> "* * * although there are no regulations or statutes which dictate any procedure for rent reduction in a City-assisted project, the City generally follows the [Federal Urban Renewal] handbook for rent reductions due to project activities. As far as the determination of rent in a City-unassisted project we are still bound by the Administrative Code."

The Questions are Substantial

1. *Scope and Economics*: This case involves the occupational rent for "temporary" occupancy of a condemnation site for the period between vesting of title in the municipality and the eviction of the occupant—*before* the site is cleared and delivered by the municipality to the developer for the permanent project contemplated by the condemnation. Condemnation has terminated all leases.[13] The realty has been removed from the tax rolls.

(a) Exhaustive research has revealed a veritable legal vacuum on the subject, despite the voluminous statutes, case-law and commentaries on the subject of eminent domain for centuries. General land-law imposes a charge of reasonable value for use and occupancy, provided there is agreement between owner and occupant for possession, though not for the amount of rent.[14] Condemnation case-law generally follows that land-law as to occupational rent.[15] In New York, absent agreement between condemnor and occupant, and absent statute, the State was denied any recovery of occupational rent (apart from set-off).[16] Most New York condemnation statutes providing for occupational rent were enacted in the 1960's; typically,

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[13] N.Y.C. Admin.Code § B15-37.0(a); In re Allen Street etc., 256 N.Y. 236 (1931).

[14] N.Y. Real Prop.L. (49 McKinney's) § 220, L.1909,c.52; Preston v. Hawley, 101 N.Y. 586 (1886), after remand 139 N.Y. 296 (1893).

[15] E.g., Lowell Housing Authority v. Save-Mor Furniture Stores, 346 Mass. 426, 193 N.E.2d 585 (1963).

[16] Geist v. State, 3 Misc.2d 714, at 719, 156 N.Y.S.2d 183 (Ct. Cl., 1956).

they provide for occupational rent at reasonable value of use and occupancy.[17] New Jersey seems to be the only state which has spelled out the standards by statute, including the difference in occupational rent depending on whether occupancy is with or without permission.[18] No cases have been found raising constitutional questions on the subject.

(b) The particular statute involved here, § B15-37.0 of the Administrative Code, applies to condemnations throughout the City of New York, for any purpose. In 1965, on the City's proposal, § B15-37.0 was copied into the New York Public Housing Law;[19] the provisions now apply throughout the State of New York in condemnations incident to new public housing. Those two New

[17] E.g., N.Y. Highway Law (24 McKinney's) § 29(12), (13-3), added L.1962, c. 310, § 183. See Falso Heating & Sheet Metal Co. v. State, 59 Misc.2d 12, 297 N.Y.S.2d 693 (Ct. Cl., 1967).

[18] N.J.S.A. Title 20 (Eminent Domain), § 20:3-19, L.1971, c.361, § 19:

> "* * * A property owner who refuses to vacate said property or yield possession and remains in possession more than 20 days after service of notice shall be deemed a trespasser and shall be then liable for rents, issues and profits 20 days after service. * * * If the owner or tenant occupies the property with the condemnor's permission on a rental basis for a short term or for a period subject to termination on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short term occupier. * * *"

See Housing Authority of City of East Orange v. Leff, 125 N.J. Super. 425, 311 A.2d 213 (1973).

[19] N.Y. Public Housing Law (44A McKinney's) § 127, amended L.1965, c.467. See Memorandum of Legislative Representative of City of New York, McKinney's Session Laws of 1965, at 2067.

York statutes are unique in this country in fixing an occupational rent by rigid statutory formula and in ousting the courts of jurisdiction to determine or review occupational rent on condemnation sites.

(c) Robbins has remained in occupancy on the Jamaica site for over three years since condemnation. On another site condemned by the City in 1965, Robbins has remained in occupancy for over nine years. Those situations illustrate an economic reality: Many of the grandiose municipal plans for urban renewal have aborted, or have been indefinitely postponed, as municipalities and developers have become insolvent, as costs of money and construction have rocketed, and as needs and priorities have been revised. "Temporary" occupancy of condemnation sites between vesting and new construction, keeps growing in length and in frequency.

(d) The immediate questions of law here involve the City's management of real estate acquired by condemnation and the local statutes that apply specifically to condemnations. The broader questions involve the constitutional limitations on the City's power to unilaterally fix rent and other terms of occupancy of any property owned by it, however acquired. The constitutional questions would likewise apply (e.g.) to property acquired by the City by *in rem* tax foreclosure—another mushrooming situation in the City of New York. There, too, tax foreclosure on the fee would terminate leases.[20]

The City's Department of Real Estate and Department of Relocation manage much of the City's real estate, notably condemnation sites before development and tax-foreclosure acquisitions. Both Departments seem to have

[20] N.Y. Real Property Tax Law (49A McKinney's) § 1116, L.1958, c.959. See City of New Rochelle v. Stevens, 271 A.D. 977, 68 N.Y.S.2d 31 (2d Dept., 1947), affd. 297 N.Y. 533 (1947).

stopped issuing public reports. The last report found, for 1968, shows that the Department of Real Estate held 29,961 properties (with almost 4,000 buildings) occupied by 7,089 tenants (of whom 1,885 were commercial)—a substantial increase over the previous year. In 1972, the Department held about 4,000 buildings that generated about $8,800,000 in rents.[21] Other departments and autonomous authorities lease piers, markets, housing, etc. The City of New York is in the real estate business in a very big way.

(e) The City needed this statute, § B15-37.0(b), to fix the post-condemnation occupant's rent. Prior to 1962, the New York courts had denied the City the right unilaterally to fix an occupational rent by notice to vacate or pay.[22] In a federal condemnation in New York the Second Circuit denied such right to General Services Administration:

> "* * * We know of no principle of contract law that requires a party to choose between accepting an unpalatable offer and giving up his legal right to possession. We therefore conclude that no agreement was entered into * * *."[23]

Those cases were applications of general land-law. In New York, if a lease terminates mid-term through no

[21] State Comptroller Report No. NYC-43-73, Audit Report on N.Y.C. Dept. of Real Estate (1973), Table 3.

[22] New York City Housing Authority v. Philmo Garage Corp., 187 Misc. 413, 63 N.Y.S.2d 236 (App.T., 1st Dept., 1946); New York City Housing Authority v. Knowles, 200 Misc. 156, 103 N.Y.S.2d 270 (Mun.Ct., Bx., 1951).

[23] U.S. v. Certain Interests in Property in Brooklyn, etc., 302 F.2d 201, at 203 (2d Cir., 1962).

fault of the tenant, *e.g.*, by foreclosure of the landlord's mortgage and subordinate tenancies, the foreclosure purchaser has no unilateral right to fix the occupant's rent; absent a new lease by bilateral agreement, the new owner is entitled to no more than reasonable value for the use and occupancy.[24] The same now applies in New York to hold-overs after simple expiration of the term of a lease.[25]

Here, while the City claims exemption from Due Process because it acts as landlord in its "proprietary" capacity, the City has employed its "governmental" powers to enact § B15-37.0(b) and to exact a rent from an occupant which no private land-owner in New York would be entitled to.

(f) The Federal regulations (quoted above) *add* an income standard to the market-value standard for occupational rent on condemnation sites. By contrast, the City of New York has *substituted* an income standard for a market-value standard as to former tenants. If a former tenant does not suffer enough of a net loss on the site to arouse the commissioner's pity, the former tenant is charged for occupancy at the punitive statutory rate.

The income standard is extrapolated from the general pattern of law and economics in subsidized new public housing. Admission, occupancy and rent in public housing depend on the occupants' income. The tenancies are invariably at will or month-to-month. On short notice, the occupants can be evicted, or their rents can be modified, because they have no "tenure" and no "right" of occupancy.

[24] United Security Corp. v. Suchman, 307 N.Y. 48 (1954).

[25] N.Y. Real Property Law (49 McKinney's) § 232-c, L.1959, c.114, § 1; Jaraslow v. Lehigh Valley R.Co., 23 N.Y.2d 991 (1969). See Stern v. Equitable Trust Co., 238 N.Y. 267 (1924).

The displaced occupant of a condemnation site receives no new space constructed at public cost and leased at below-market-value. His neighbors and his incoming successors will benefit from the new project—not he. He occupies old space legislatively found to be "blighted" and "substandard". He did not apply for admission to the site; he was there before the condemnation. His choice does not involve moving in, but moving out. He remains in occupancy only until he can relocate or liquidate. His occupancy and his rent are not for profit in a going business, but to minimize loss in a terminated business.

Yet, § B15-37.0(b) applies that subsidized-public-housing income standard to displaced commercial occupants of condemnation sites. Contract exists only by implication from occupancy, at the City's option, to provide a technical boot-strap to confer jurisdiction in summary proceedings and to unilaterally fix the rent. The rent is not fair rent. Adjustment is available—if the occupant suffers a net loss in operations on the site. If the merchant can afford to pay an exorbitant rent without bankruptcy, the City exacts the exorbitant statutory rent. There is nothing between compassion and oppression.

This is the welfare state run amok. The bureaucrat has supplanted the chancellor. Equity in condemnation is dead—unless this Court intercedes.

2. *The City's "Proprietary" Capacity and Unilateral Rent Determination*: The City has argued, and the New York courts below have decided, that the statutory "provision made [by § B15-37.0(b)] for the determination of rent was a proper exercise of authority by the City". They held that the City's authority to acquire, lease and manage real estate carried a right to unilateral determination of rent by the City, as a condition of occupancy, regardless of the circumstances of occupancy, regardless

of how exorbitant or outrageous the rent. The New York courts saw no Due Process or Equal Protection limitations on that power.

The threshold question here is the same Constitutional question that was raised twice in *Thorpe* v. *Housing Authority of City of Durham*,[26] but was not decided when Federal regulations were applied to the federally-assisted project. In this case, absent Federal assistance, there are no binding Federal regulations.

Thorpe involved a landlord-tenant summary proceeding to dispossess a residential tenant in a public housing project; her month-to-month lease had expired by nonrenewal and notice. This case involves a landlord-tenant summary proceeding to dispossess a commercial tenant on a public condemnation site; his pre-condemnation lease had terminated, and a tenancy at will at an exorbitant rent had been foisted on him because he remained in occupancy more than ten days after condemnation. Notwithstanding the factual distinctions, the quintessence of the North Carolina Supreme Court's first decision summarizes the New York courts' position here:

> "* * * With its [the lease's] termination, all right of the defendant to occupy the plaintiff's [City's] property ceased. Since that date the defendant has been and is a trespasser upon the plaintiff's land."
>
> "* * * It is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease."[27]

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[26] 386 U.S. 670 (1967), vacating and remanding 267 N.C. 431, 148 S.E.2d 290 (1966); 393 U.S. 268 (1969), reversing and remanding 271 N.C. 468, 157 S.E.2d 147 (1967).

[27] 148 S.E.2d at 291-2.

Implicit in the unrestrained power to evict, is the power to impose conditions upon occupancy, including the unilateral determination of rent.

The opposing view—that the 14th Amendment limits the municipality as landlord—was crystalized by Justice Douglas in his concurring opinion in the first *Thorpe* case:

> "Over and over again we have stressed that 'the nature and the theory of our institutions of government, the principles upon which they are supposed to rest * * * do not mean to leave room for the play and action of purely personal and arbitrary power' [case] and that the essence of due process is 'the protection of the individual against arbitrary action.' [Cases] Any suggestion to the contrary 'resembles the philosophy of feudal tenure.' [Article] It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment. 'The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process.' Rudder v. United States, [citation]."[28]

Conflict and ambiguity abound in the federal and state courts as to the effect of federal Due Process and Equal Protection on municipal real estate law and management. In New York, for example, the state courts have held Due Process and Equal Protection applicable to housing situations, to a marginal degree along the lines of the welfare

[28] 386 U.S. at 678.

cases—limited to "eligible" recipients of municipal grace.[29] But in non-housing situations, the City's "proprietary" rights are unlimited. E.g., in New York:

> "* * * The plaintiffs [occupants] fail to demonstrate that they have or may have acquired any rights to occupancy or use of space in the [City-owned] market other than those provided for in the original leases accepted by them. * * *"[30]

This is the concept stated by the Third Circuit in *U.S.* v. *Blumenthal*:

> "* * * But the plaintiff [United States], which is here acting in its proprietary rather than its governmental capacity, has the same absolute right as any other landlord to terminate a monthly lease by giving appropriate notice and to recover possession of the demised property without being required to give any reason for its action. [Cases.] * * *"[31]

By contrast, the Second Circuit[32] and the District of Columbia Circuit[33] have adopted radically different views.

[29] Matter of Sumpter v. White Plains Housing Authority, 29 N.Y.2d 420, 328 N.Y.S.2d 649 (1972), cert.den. 406 U.S. 928; Matter of Fuller v. Urstadt, 28 N.Y.2d 315, 321 N.Y.S.2d 601 (1971).

[30] D'Arrigo Bros. Co. v. City of New York, 39 A.D.2d 678, at 679, 332 N.Y.S.2d 297 (1st Dept., 1972).

[31] U.S. v. Blumenthal, 315 F.2d 351 (3d Cir., 1963). *Accord*: Brand v. Chicago Housing Authority, 120 F.2d 786 (7th Cir., 1941).

[32] Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir., 1968); Norwalk Core v. Norwalk Development Agency, 395 F.2d 920 (2d Cir., 1968); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir., 1970), cert.den. 400 U.S. 853.

[33] Rudder v. U.S., 96 App.D.C. 329, 226 F.2d 51 (1955).

The Constitutional question in *Thorpe* is here—whether the 14th Amendment limits a municipality's power to "manage" its real estate in its "proprietary" capacity—and is ripe for decision.

3. *No Trespass, No Penalty—Robbins' Right of Possession*: The Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 provides for at least ninety days' notice to occupants before dispossess.[34] Under Federal and New York law, the preservation and removal of personal property such as merchandise and trade fixtures—not taken by condemnation—are a cost to the occupant alone, and are not compensable, regardless of consequential damages.[35] Ten days' notice to vacate, would devastate a merchant.

(a) In putting an occupant to an election either to vacate within ten days or to pay an exorbitant ret, §B15-37.0(b) of the Administrative Code is inconsistent with the Federal Relocation Act. So the City concedes. For, while § B15-37.0(b) reads—

> "b. All persons in possession * * * shall * * * become tenants at will of the city and shall * * * pay the same rent * * * unless within ten days * * * they shall elect to vacate * * * ."

—the Corporation Counsel states:

> "* * * the occupant is merely required to elect or reject tenancy within 10 days and has 90 days in

[34] P.L. 91-646, 84 Stat. 1894 (1970), 42 U.S.C. § 4651(5).

[35] U.S. v. 1,132.50 Acres etc., 441 F.2d 356, at 359-360 (2d Cir., 1971), cert. den. 404 U.S. 850 (applying New York law); 4 Nichols on Eminent Domain, §§ 14.2471[2](B), 14.4. See U.S. v. General Motors Corp., 323 U.S. 374, at 380 (1945).

> which to relocate should he elect not to remain as a tenant at will; * * * ."[36]

(b) Robbins had a right or privilege of occupancy after condemnation. Robbins was on the site when the City arrived by eminent domain. Unlike the housing cases, Robbins did not seek a tenancy from the City. On the contrary, Robbins rejected any tenancy; the City sought to foist a tenancy on Robbins. Unlike the housing cases, Robbins was not in possession by sufferance of the City. On the contrary, Robbins had a right or privilege of possession, apart from the City's discretion: A statutory policy granted possession to Robbins for at least three months, and the City did not need—nor demand—possession for at least sixteen months.

(c) By design, § B15-37.0(b) follows old New York case-law which allowed a land-owner by notice to put an election to an occupant without a lease (usually a hold-over), *viz.*: vacate by a stated time, or hold for a new stated term at a stated rent. The terms were unilateral; continued occupancy was deemed "assent" and implied agreement. The case-law expressly acknowledged that the land-owner's power to fix the rent unilaterally, was a penalty imposed on the occupant for trespass.[37] Moreover, in New York, damages for occupancy measured by the value to the occupant, rather than by fair market-value rent (or reasonable value of use and occupancy),

[36] City's Motion to Dismiss Appeal, 2/14/75, ¶ 9, p.6, in New York Court of Appeals.

[37] Schuyler v. Smith, 51 N.Y. 309 (1873); United Merchants Realty & Improvement Co. v. Roth, 193 N.Y. 570 (1908). (The rule was abrogated by statute, N.Y.Real Prop.L. § 232-c, L.1959, c.114, § 1.)

is awarded only for wilful trespass, and is a civil penalty for trespass.[38]

The rent exacted under § B15-37.0(b), and awarded to the City by the judgment below, would be due to a private land-owner only as a penalty against Robbins for wilful trespass. But Robbins was no trespasser—certainly not for the 3½ months for which the City has sued here for rent.

(d) A person who already possesses a right, or even a privilege, cannot be denied "standing" or "eligibility" to invoke Due Process and Equal Protection.

> "It has long been settled that a party aggrieved by loss of a pre-existing right or privilege may enjoy procedural rights not available to one denied the right or privilege in the first instance. * * *"[39]

Where the Federal Relocation Act and municipal adoption of those policies give a post-condemnation occupant a right of possession, the statutory policy implies a fair and reasonable occupational rent. Given the right of possession, federal Due Process and Equal Protection compel a fair and reasonable occupational rent.

4. *Equal Protection—Owners and Tenants*: All presumptions of legislative validity yield to a "caution":

> "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[40]

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[38] N.Y. Real Prop.Actions & Proceedings Law (49½ McKinney's) § 601, L.1962, c.312, § 20. See, e.g., DeCamp v. Bullard, 159 N.Y. 450 (1899); Wallace v. Berdell, 101 N.Y. 13 (1885), amending 98 N.Y. 480 (1885).

[39] Matter of Sumpter v. White Plains Housing Authority, 29 N.Y.2d 420, at 425 (1972), cert.den. 406 U.S. 928. See Goldberg v. Kelly, 397 U.S. 294 (1970).

[40] Morey v. Doud, 354 U.S. 457, at 464 (1957).

The statutory classification of § B15-37.0 distinguishes between those who owned the real estate and those who did not—between the haves and have-nots. The former owners owe "reasonable value for the use and occupancy of the premises", under § B15-37.0(c)—by definition, fair rental value. The former non-owners in this case, under the statutory scheme, owe over twice as much as they would have owed if they had owned the realty—more than double the fair rental value. Those consequences alone compel "careful consideration".

The Civil Court found the "fair rental value" of the premises here to be $21,000 per year after condemnation. Under § B15-37.0(c), $21,000 per year is the rent a former owner would have paid for Robbins' premises. But $48,000 per year is what the City obtained judgment for below—and the City is demanding at least $51,863 per year from Robbins as a former tenant.

There is more inequality—and inequity. Under New York law, the maximum liability of a former owner is limited to the interest on his award, or the interest-value of his fee-award. (That award will involve a capitalization of Robbins' pre-condemnation rent.) The City's appraisal (according to the Corporation Counsel) is $370,000. The owner's appraisal, of course, is higher; the 1971-72 tax assessment was $325,000; no award has yet been made. For convenience, use the City's appraisal as a base: At six percent, the interest value is $22,200 per year. To justify the rent under § B15-37.0(b), and the effectual collection of taxes from Robbins on realty removed from the tax rolls, the City speaks of "fair return" on its "investment" in the real estate (i.e., its payment of the fee-award). While the former owner would pay a maximum of six percent per year on the City's investment, the former tenant is charged more than fourteen percent.

It is not the land which the City values during the clearance period—it is the money for the awards. Virtually every reported appellate case in New York dealing with a charge for use and occupancy, has arisen in the context of set-off against interest on an award. For over a century, the New York Court of Appeals has *not* determined an owner-occupant's use and occupancy. Rather, the New York Court of Appeals has repeatedly ruled that the owner's occupancy—irrespective of actual value to anyone—cancelled or barred interest or "delay compensation" on the award for the period of the claimant's actual occupancy.[41] This is consistent with recent cases in other jurisdictions which have also set interest or interest-value on the fee award as the maximum liability for an owner's use and occupancy of a condemnation site.[42]

The New York Court of Appeals did not posit this as economics but as equity. The equity was not in the condemnor's receiving fair rental value for the land just acquired. The equity was in preventing a double payment to the claimants—once for delay compensation on the fee-award money, and again for use and occupancy of the land.

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[41] LaPorte v. State, 6 N.Y.2d 1 (1959), app.dismd. 361 U.S. 116 (1959); Matter of Riverside Park [Application of Mayor], 59 A.D. 603, 69 N.Y.S. 742 (1st Dept., 1901), affd. on opin. below, 167 N.Y. 627 (1901); Donnelly v. City of Brooklyn, 121 N.Y. 9, at 21-22 (1890); Hamersley v. Mayor of New York City, 56 N.Y. 533, at 538 (1874).

[42] E.g., People v. Giumarra Vineyards Corp., 245 Cal.App.2d 309, at 321-3 (1967); People [by Mondale] v. Bohnen, 273 Minn. 266, 140 N.W.2d 838 (1966); Urban Development Authority of Pittsburgh v. Cleban, 216 Pa.Super. 269, 264 A.2d 187 (1970). See U.S. v. 967,905 Acres etc., 447 F.2d 764, at 773-4 (8th Cir., 1971), cert.den. 405 U.S. 974 (1972).

> "* * * interest in condemnation cases until the award is a substitute for the use of real property, and, * * * the burden is ordinarily upon the condemnor to prove by way of offset that the value of the use has been at least equal to the interest, * * *."[43]

> "Since interest is awarded to compensate for the deprivation of the use of property, and the condemnee in possession has not been deprived of such use, an award of interest would provide a *double recovery which the law will not tolerate* * * *."[44]

A shocking discrimination against tenants needs a powerful reason.[45] Bureaucratic convenience is all there is to rationalize the discrimination here—and that is not enough to satisfy Equal Protection.[46]

5. *Substantive Due Process—Fair and Reasonable Occupational Rent*: This is rate-making case. The rate—the rent—for use of public property has been set by statute, § B15-37.0(b). The statute alone is in question; there is no question of delegation. While rental value was falling on the condemnation site (the converse of residential rent control), the City froze rents on the site at a high.

(a) From the earliest regulation of commerce, the courts have invoked substantive Due Process to assure

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[43] LaPorte v. State, supra, 6 N.Y.2d at 7.

[44] Chester Litho v. Palisades Interstate Park Comn., 27 N.Y.2d 323, at 326 (1971) (emphasis supplied).

[45] Lindsey v. Normet, 405 U.S. 56 (1972).

[46] Goldberg v. Kelly, 397 U.S. 254 (1970); Van Lare v. Hurley, —— U.S. —— (# 74-453, 5/19/75); Good Humor Corp. v. City of New York, 290 N.Y. 312 (1943).

that regulation did not exceed the reasonable, and did not extend into the confiscatory—necessarily a matter of fact, determined case-by-case. The regulation of railroad rates brought early definition:

> "* * * What the [railroad] company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. * * *"[47]

Those principles of rate-making were carried into (e.g.) the earliest rent-control cases, by the legislatures as well as the courts.[48] Allowance for changing economic conditions was equally necessary under Due Process.[49] Those principles should be adapted and applied here.

(b) The City concedes that the statutory post-condemnation occupational rent should be based on *rental value*. Section B15-37.0(b) has set the occupational rent at the amount of the rent reserved in the terminated pre-condemnation lease. This is not the usual presumption or rule of evidence which shifts the burden of proof. This is a fixed legislated substantive rate, with no provision for any factual finding of rental value.

Under both Federal and New York law, as a matter of law, that statutory standard of rental value is wrong.

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[47] Smyth v. Ames, 169 U.S. 466, at 547 (1898).

[48] E.g., Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922), affg. 230 N.Y. 634 (1921).

[49] E.g., Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924).

The Corporation Counsel says:

> "* * * the statutory standard ('the same rent in effect immediately prior to vesting of title') is based on the most probative available evidence of rental value—a recently established rental which the tenant had himself agreed to—* * *."[50]

That standard of the City's has been repeatedly and emphatically rejected by the New York Court of Appeals in valuation cases. In situations like this, where the condemnation was authorized and publicized in 1970, two years before title-vesting, "condemnation blight" causes real estate values—including rental values—to drop precipitately, even before vesting.[51] In valuation proceedings, reliance on pre-condemnation lease rents may be reversible error *per se*:

> "* * * the court below fell into inadvertent error when it indicated that it had taken into consideration rentals reserved in certain of the leases which were less than the fair rental values at the time of the taking [citing Mott Haven]. However, this does not require a reversal, since * * * '*the actual rentals are no absolute criterion*', * * *."[52]

In cases where the courts have determined reasonable value of use and occupancy—even where the occupant was a trespasser—the standard was rental value. The rent reserved in a dead lease was evidentiary at most.

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[50] City's Brief, Appellate Division, at p. 21.

[51] Brown v. U.S., 263 U.S. 78 (1923); City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241 (1971).

[52] Matter of City of New York [Lincoln Square Slum Clearance], 16 N.Y.2d 497 (1965) (emphasis supplied).

> "The damage which the landlord has sustained in this case does not necessarily mean the rent reserved in the lease; it means the rental value of the premises for the year in question, what they would have been worth in the market if the lessor had been free and able to rent them. The rent reserved may be some evidence of that value. [Case cited.]"[53]

The Federal law on rental value is the same as the New York law. In dealing with "just compensation" for a leasehold taken by eminent domain, as a matter of constitutional law, this Court ruled that "market rental value" should be the measure of the value of the leasehold to an occupant for an indefinite period:

> "* * * just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.' * * *"[54]

> "* * * The value of such an occupancy is to be ascertained * * * [by] what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier. * * * In so ruling we do not suggest that the long-term rental value may not be shown as bearing on the market rental value of the temporary occupancy taken. It may be evidence of the value of what is taken but it is *not the criterion of value* in such a case as this."[55]

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[53] Goelet v. National Surety Co., 249 N.Y. 287, at 295 (1928).

[54] U.S. v. Petty Motor Co., 327 U.S. 372, at 377 (1946).

[55] U.S. v. General Motors Corp., 323 U.S. 373, at 382-3 (1945). (Emphasis supplied).

If Due Process compels an occupational rent on a condemnation site at no more than the market rental value or the reasonable value of use and occupancy, then § B15-37.0(b) is repugnant to the Due Process provisions of the 14th Amendment, on the face of the statute.

6. *Procedural Due Process*: The City engineered this post-condemnation occupancy arrangement to omit any judicial procedure to determine the occupational rent in any forum, judicial or administrative, and to bar any judicial review.[56]

Section B15-37.0(b) fixes an occupational rent from condemnation to dispossess, by a formula that involves no judgment. The only statutory exception is "unless otherwise agreed"—nothing more. Under the statute, any rent adjustment is optional and discretionary. There is no statutory standard for adjustment. The only administrative standard for adjustment is "hardship"—and the adjustment is charity. The administrative procedure for adjustment is not quasi-judicial. There is no hearing. Between .the occupant's application in writing and the commissioner's decision, the adjustment process is inside the Department, while the occupant waits outside.

Under New York law, "management" and "discretion" alone are not subject to judicial review;[57] the City's Department of Relocation can "adjust" and dispense charity as it likes. On the other hand, if this rent-fixing is not "management" but rate-making, it is *legislative* rate-

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[56] The adequacy of judicial review of administrative decisions under New York law, is summarized in Holmes v. New York City Housing Authority, 398 F.2d 262, at 267, notes 6, 7 (2d Cir., 1968).

[57] Matter of Gimprich v. Board of Education, 306 N.Y. 401 (1954).

making. The device of *not* providing for quasi-judicial proceedings, constitutes the rate-making "legislative", *ipso facto*. Legislative rate-making is not subject to judicial review in New York.

> "An Article 78 proceeding * * * may not be utilized to review legislative action [cases cited], and an order of an administrative agency fixing rates is deemed a legislative act, at least where no provision has been made for notice and a hearing. * * *
>
> "The petitioners are not, of course, remediless. They may challenge rate increases made by the Authority on any grounds open to judicial review of quasi-legislative decisions, namely, that the appellant acted in disregard of statutory standards, in excess of its grant of authority, in violation of due process or in a discriminatory manner. They may also attack the constitutionality of the statute delegating power to act. [Cases cited.]"[58]

The Department of Relocation cannot act in disregard of statutory standards, because there are no statutory standards. Absent a right to a hearing, there is no denial of procedural Due Process. Since it treats all ex-tenants alike, the Department is not discriminating between one tenant and another; the discrimination is in the statute which distinguishes ex-tenants from ex-owners.

Absent any procedure to obtain a fair rent, Robbins must look to the courts. The scheme of § B15-37.0(b) leaves the ex-tenant-in-occupancy with no right to fair occupational rent, no right to hardship adjustment, no forum for his claims as to fairness. He has only the last

[58] Matter of Lakeland Water District v. Onondaga County Water Authority, 24 N.Y.2d 400, at 407-8 (1969).

remedy—to attack the constitutionality of the statute. It is § B15-37.0(b) itself which violates Due Process and Equal Protection—by design.

There is a continuing need for the federal courts to bring the City of New York within the 14th Amendment. This is another occasion.

7. *What Is* Not *Involved*: "Hardship adjustment" based on the occupant's net losses and ability to pay, is immaterial to the fairness of the rent that the occupant is able to pay. Establishment of a fair rent, and adjustment of rent for hardship, are on two separate tracks. If the occupant has *no right* to a *fair* rent, then the City's "remedy" for hardship is *not* a remedy for unfairness.

> "* * * The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."[59]

(a) From the start of the trial in the Civil Court to the present, sometimes by stipulation of counsel, sometimes by order of the Civil Court, provision has been made for part payment of occupational rent to the City and for security to the City for what Robbins would owe if the City ultimately prevailed. Efforts have been made to settle the case, without success. All this has been done "without prejudice".[60]

(b) On appeal below, the City radically modified its position in several material respects, such as the avail-

[59] Roller v. Holly, 176 U.S. 398, at 409 (1900).

[60] See Svenska Taendsticks Fabrik Aktiebolaget v. Bankers Trust Co., 268 N.Y. 73, at 81 (1935).

ability of retroactive adjustment; and the City added matter that had never been subject to examination at the trial. To avoid muddying the issues, Robbins has accepted the City's post-trial offers. For present purposes, the new matter is immaterial, for it bears only on the subject of hardship adjustment.

(c) Relocation benefits are available to displaced occupants of condemnation sites, such as moving expenses, from City, State or Federal funds. The availability and amount of those relocation benefits has no relation to the occupational rent after condemnation nor to whether the occupant was an owner or a tenant of his premises before condemnation. Whether those relocation benefits affect the City's administrative "hardship adjustment" of occupational rent, is known only to the City. Those relocation benefits are immaterial to the fairness of the occupational rent.

(d) Robbins concedes the theoretical availability of administrative "hardship adjustment" of occupational rent. Robbins concedes its election not to seek such "hardship adjustment". The administrative policies are deficient, but this is not the time or place to litigate that. The issue posed here is whether Robbins is entitled to fairness, irrespective of municipal grace for hardship. Under § B15-37.0(b) and the administrative policies and practices, there is no substantive provision and no procedure to adjust the statutory rent to a *fair rent*. If "hardship adjustment" alone satisfies Due Process, Robbins is out of court. If Due Process requires fairness, § B15-37.0(b) is invalid. Apart from fairness: What "hardship adjustment" is, and how the ocupant gets it, are not involved here.

8. *Conclusion*: Ultimately, what is a "substantial" constitutional question raises a political question: Who is worthy of protection? And against whom? Over the past

15 years or so, the courts have devoted a vast amount of time to the claims of residential tenants, in rent-control and public-housing cases, and to the fee-award claims of land-owners in condemnation cases. The small businessman and commercial tenant have a just claim to this Court's time, too, certainly in a case of first impression. Once he was favored—the immigrant who preferred the independence of his own shop or farm to the status of a serf dependent on feudal grace, the citizen who preferred self-employment to the security of institutional employment. He had social values to the community. "Competition" is supposed to protect the public from economic abuse by oligopoly—and competition means the viability of many independent small businessmen. Perhaps Big Government will protect the small businessman from Big Business. Only the courts can protect the small businessman from Big Government. So the Bill of Rights contemplated. The authors expected their experience and anticipation to be outrun by the reach and zeal of government. The residue of protection they provided is Due Process. The last recourse is to the courts. Willy-nilly, Due Process will burden the courts—or wither away.

Respectfully submitted,

Melvin Lloyd Robbins
Attorney for Appellant
Robbins Men's & Boys' Wear Corp.

New York, New York
June 19, 1975

[Appendices Follow]

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fourth day of March A. D. 1975.

Present,

HON. CHARLES D. BREITEL,
Chief Judge, presiding.

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2 Mo. No. 202

THE CITY OF NEW YORK,
Respondent,

vs.

ROBBINS MEN'S AND BOY'S WEAR CORP.,
Appellant.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix A

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is involved (N.Y. Const., Art. 6, §3[b][7]).

/s/ Clerk

Appendix A

SUPREME COURT
OF THE STATE OF NEW YORK

APPELLATE DIVISION, SECOND DEPARTMENT

46 A D 2d 1016,
364 NYS2d 809

A—November 21, 1974

THE CITY OF NEW YORK,

Respondent,

v.

ROBBINS MEN'S AND BOYS' WEAR CORP.,

Appellant.

Order of the Appellate Term of the Supreme Court, Second and Eleventh Judicial Districts, dated June 27, 1973, affirmed, with costs. No opinion.

GULOTTA, P.J., HOPKINS, COHALAN, CHRIST and MUNDER, JJ., concur.

December 23, 1974

Appendix A

75 Misc.2d 104, 347 N.Y.S.2d 249

THE CITY OF NEW YORK,

Appellant,

v.

ROBBINS MEN AND BOYS WEAR CORP.,

Respondent.

Supreme Court, Appellate Term, Second Department
June 27, 1973.

Before SCHWARTZWALD, P. J., and RINALDI and CONE, JJ.

PER CURIAM.

Final judgment in favor of tenant respondent unanimously reversed, with $30 costs to petitioner landlord, and final judgment directed to be entered in favor of petitioner for the amount sought in the petition.

[1, 2] Subdivision (b) of section B5-37.0 of the Administrative Code of the City of New York, with respect to the payment of rent after the vesting of title, applies to "all persons in possession" and therefore clearly encompasses one in the position of a subtenant. We also find that the provision made for the determination of rent was a proper exercise of authority by the City (Municipal Home Rule Law § 10, subd. 1, par. a[6]; General City Law § 20, subd. 2).

Appendix A

72 Misc. 2d 707, 339 N.Y.S.2d 321

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS
L & T No. 1867/72

THE CITY OF NEW YORK,

Petitioner-Landlord,

—against—

ROBBINS CLOTHING STORE, INCORPORATED,

Respondent-Tenant

Hon. Martin Rodell, Judge

The issue in this non-payment summary proceeding seems to be one of first impression. The Court is called upon to interpret the provisions of Section B 15-37.0 of the Administrative Code of the City of New York as amended. The issue posed is the amount of rent which the City of New York may collect from a subtenant in possession, after vesting of title in a condemnation proceeding. Is it the rent paid by the sublessee to the sublessor prior to vesting; is it the amount paid by the sublessor to the owner in fee, the City's predecessor in title; or may the Court determine a rent which is fair and reasonable under the circumstances presented.

Appendix A

In its petition, the City seeks to recover the rent paid by the respondent sublessee to the sublessor, immediately prior to vesting. Respondent, on the other hand, contends that the City may recover only the amount of rent which the fee owner had received from the sublessor at time of vesting. There is a considerable disparity between the amounts, hence the dispute. The rent paid by the sublessee was $4,000. per month, the rent paid by the sublessor to the owner was $1,333. per month.

The tenant has also raised the issue of the constitutionality of the Code Section as amended. However, in conformity with the policy of our courts, the constitutional questions should not be considered unless necessary, (Keogh v. Wagner, 20 AD 2d, 380, Matter of Peters v. N.Y.C. Housing Authority 307 NY 519), the Court will not pass upon this issue, since a disposition may be made on non-constitutional grounds. In any event, the constitutionality of statutes is best left to our Appellate Courts and not one of limited jurisdiction, as the Civil Court.

Prior to the amendment to Section B 15-37.0, the Court had the authority in every instance where the parties could not agree, to determine the reasonable value in use and occupation of rented premises after vesting of title (N.Y. City Housing Authority v. Philmo Garage Corp. 67 NYS 2d 48).

The City correctly argues that the amendment to the Statute changed that procedure. The right of the Court to fix a reasonable value for the premises is limited only to an owner in possession; as to persons in possession, the authority of the Court is limited to a direction that they continue to pay the rent in effect at the time of vesting.

Appendix A

The respondent in turn, takes the position that the words "persons in possession" refers only to tenants who were paying rent directly to the fee owner and not to sublessees in possession as in the instant case.

The Statute in question reads as follows:

> b. All persons in possession of such premises at the time of the vesting of title thereto in the City, shall at the option of the City become tenants at will of such City, and shall, unless the parties otherwise agree in writing, pay the same rent in effect immediately prior to vesting of title or unless within ten days after the vesting of title they shall elect to vacate and give up their respective holdings.
>
> c. Where a person or persons in possession of the premises at the time of vesting of title thereto are the owners thereof, such person or persons shall at the option of the city become tenants at will of such city, unless within ten days after the vesting of title they shall elect to vacate and give up their holdings. Where such person or persons fail to vacate and give up their holdings, and become tenants at will of the city as herein provided, such person or persons shall pay the reasonable value for the use and occupancy of the premises.

In order to marshall the facts the Court called for a hearing on the issues.

The tenant introduced uncontroverted expert testimony that on a month to month basis, deprived of the security of a lease term, the reasonable value of the premises was one thousand ($1,000.00) dollars per month.

Appendix A

The tenant further presented proof by way of one of its officers, showing a steady decline in business, compounded by the uncertainties attendant to a month to month tenancy and its concomitant inability to store stocks of merchandise consistent with its discount selling policy.

The City took the position that the above cited Section was clear in its intent and challenged on the ground of irrelevancy any evidence as to the reasonable value of the subject premises on a month to month basis.

Before a consideration of the reasonableness of the rent may be had, the Court must first ascertain whether the power rests in the Court to make such a determination. A reading of the Statute convinces the Court that it retains such power.

The purpose of the Statute as amended was to relieve the courts of the burden of establishing reasonable value in every instance, nothing more or less. It cannot be said that the framers intended to abrogate the basic theory of the statute, that a fair and reasonable rent should be paid by the remaining tenant when the circumstances so warranted.

It also appears that the statute does not contemplate the situation presented here, that of an attempt by the City to step into the shoes of a sublessor, rather than the shoes of the owner.

Under the statute before it was amended, the City stood in lieu of the owner, and the reasonable value of every occupancy was determined by the Court, whether the occupant was a former tenant or the prior owner. Thus, the City stood as direct landlord to every party in possession. It was not lessor to one and sublessor to another.

Appendix A

In adopting the new legislation, the City Council distinguished between owners and other persons in possession. However, in the Court's view, it simply neglected to make the distinction, which was not necessary under the old statute, between prime tenants and subtenants.

The Court is constrained to conclude that as remedial legislation, the amended code provision was designed to alleviate the burden of the Courts and not to deprive the Court of the jurisdiction to determine the reasonable value of occupancy subsequent to vesting of title in the City. In any event, there appears grave doubt whether the jurisdiction of the Court can be circumscribed by local law.

Having determined that the Court does have jurisdiction to determine reasonable value, before doing so, the Court notes that it will not pass on respondent's constituational challenge to the statute, which has some merit, since there is no need to do so.

At the hearing, decision was reserved on the City's objection to the tenant's expert testimony based on grounds that such testimony was irrelevant. In view of the findings herein, that objection is overruled.

To hold otherwise would put the Court in a position of granting the City a most generous "windfall." Relieved of the payment of $19,500 in real estate taxes as its predecessor in title was required to do, the City would be receiving the benefit of $2,600.00 per month more than the prior owner. Certainly the "windfall" was not contemplated by the framers of the Statute.

On the other hand, the Court finds inequity in the tenant's contention that it should pay to the City only that amount that the owner was receiving from the sublessor.

Appendix A

While the Court is mindful of the diminution in the value of the tenant's premises because of the loss of a valuable lease term, nevertheless, the Court has evaluated the evidence adduced, and finds that there must be more value to the continued operation of the business than in its discontinuance. Accordingly, the testimony of tenant's expert, while probative, is not conclusive. The Court also rejects tenant's argument that the reasonable use and occupancy is the $1,133.33 per month paid by the sublessor to the owner. There is also the consideration that the City will have to expend monies to keep the exterior and structure of the premises in good repair, absent the lease.

With respect to the decrease in tenant's business the Court notes that the City initially advanced the argument that there was an administrative procedure for alleviation of rent based on loss of business by a tenant. After the hearing, the City stipulated that there was, in fact, no machinery provided for the relief contemplated by the statute.

As a matter of public policy, the Courts should be wary in directing the payment of exhorbitant rents as provided in subleases as against the rent provided in major leases. The former may be subject to the temptation of collusion to possibly enhance the value of the property in a condemnation proceeding, and the result may very well be a mulcting of the City of New York. A major lease, arrived at arms-length would be more reflective of the true value of the property and a more secure basis for a determination by the Court.

On all of the facts, the Court finds the reasonable use and occupancy of the premises to be One thousand seven hundred and fifty ($1,750.00) per month.

Final judgment for landlord for $5,266.80. Five days stay.

Dated: 12/11/72

MARTIN RODELL
Judge of the Civil Court

APPENDIX B

Administrative Code of the City of New York, Chapter 15, Title B (Consolidated Condemnation Procedure) § B15-37.0, L.1937, ch.929, amended Local Law No. 63, 1948, amended Local Law No. 57, 1962:

a. Where the whole of any lot or parcel of real property, under lease or other contract, shall be taken, all the covenants, contracts and engagements between landlord and tenant or any other contracting parties touching the same, or any part thereof, upon the vesting of title in the city, shall cease and determine and be absolutely discharged. Where part only of any lot or parcel of real property so under lease or other contract shall be so taken, all contracts and engagements respecting the same, upon such vesting of title, shall cease and determine and be absolutely discharged, as to the part thereof so taken, but shall remain valid and obligatory as to the residue thereof.

b. All persons in possession of such premises at the time of the vesting of title thereto in the city, shall at the option of the city become tenants at will of such city and shall, unless the parties otherwise agree in writing, pay the same rent in effect immediately prior to vesting of title or unless within ten days after the vesting of title they shall elect to vacate and give up their respective holdings.

c. Where a person or persons in possession of the premises at the time of vesting of title thereto are the owners thereof, such person or persons shall at the option of the city become tenants at will of such city, unless within ten days after the

Appendix B

vesting of title they shall elect to vacate and give up their holdings. Where such person or persons fail to vacate and give up their holdings, and become tenants at will of the city as herein provided, such person or persons shall pay the reasonable value for the use and occupancy of the premises.

d. Where a person in possession is entitled to an award in such proceeding the rental as provided in subdivision b and the sum fixed for use and occupation as provided in subdivision c herein, during the period between the date of vesting of title in the city and the date of the actual payment of the award, shall be a lien against such award, subject only to liens of record at the time of the vesting of title in the city.

New York Municipal Home Rule Law (35C McKinney's) § 10, subd. 1a(6):

§ 10. General powers of local governments to adopt and amend local laws

1. In addition to powers granted in the constitution, the statute of local governments or in any other law,

(i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government and,

(ii) every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general

Appendix B

law, relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:

a. A county, city, town or village:

* * *

(6) The acquisition, care, management and use of its highways, roads, streets, avenues and property.

* * *

New York City General City Law (20 McKinney's) § 20, subd. 2:

§ 20. Grant of specific powers

1. * * *

2. To take, purchase, hold and lease real and personal property within and without the limits of the city; * * * and also to acquire by condemnation real and personal property within the limits of the city, for any public or municipal purpose, and to sell and convey the same, but the rights of a city in and to its water front, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places, are hereby declared to be inalienable, except in the cases provided for by subdivision seven of this section.

* * *